

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
D & W AUTO SERVICE CENTER, INC.	:	DETERMINATION
AND PAUL WEHR, AS OFFICER	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period December 1,	:	
1980 through February 28, 1982.	:	

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Petitioners, D & W Auto Service Center, Inc. and Paul Wehr, as officer, 3263 Bertha Drive, Baldwin, New York 11510, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1980 through February 28, 1982 (File No. 801484).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on January 7, 1988 at 1:15 P.M. Petitioners appeared by Marc S. Krieg, Esq. The Audit Division appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether an audit utilizing gasoline purchases reported by the corporate petitioner's supplier and repair sales estimated on audit experience properly determined sales and use taxes due.

II. Whether petitioner Paul Wehr was a person required to collect tax on behalf of the corporate petitioner.

FINDINGS OF FACT

1. Petitioner D & W Auto Service Center, Inc. ("the corporation") operated an automobile service station at 605 Merrick Road, Rockville Centre, New York during the period at issue.

2. An audit of the corporation for the period January 1 through December 23, 1981 was conducted by the Audit Division. The business was closed at the time of the audit, which took place in the first half of 1983. The audit method was as follows:

- (a) The corporation had filed sales tax returns only for the quarters ending May 31, 1981 and August 31, 1981.
- (b) Books and records available for audit consisted of a record of deposits to and disbursements from the corporation's checking account.

- (c) Records requested but not made available included sales and purchase invoices, Federal and State income tax returns and related worksheets, purchases journal, record of cash payouts and sales tax worksheets.
- (d) Reconciliation of gross sales per the corporation's records for the audit period of \$77,898.00 with gross sales per the sales tax returns filed of \$62,655.00 indicated unreported sales of \$15,243.00.
- (e) Reconciliation of gasoline and diesel fuel purchases per records of \$58,145.60 with third-party verification from the corporation's supplier, Amtec Petroleum, Inc. ("Amtec"), of \$205,966.32 indicated unreported purchases of \$147,820.72, for a 254.23% margin of error.
- (f) The auditor used the Amtec purchases of \$205,966.32 plus a gross profit of 12 cents per gallon (based on office experience) for 172,758 gallons. After allowing for nontaxable State and Federal excise taxes, the audited taxable gasoline and diesel fuel sales were \$210,002.52.
- (g) Repair sales were estimated at \$1,500.00 per week for each of two service bays for 48 weeks, as the station was determined to have been open for 51 weeks and an allowance of three weeks was made for vacations and holidays. This resulted in audited repair sales of \$144,000.00.
- (h) Total audited sales were \$354,002.73. Reported sales were \$62,655.00, resulting in unreported taxable sales of \$291,347.73 and additional tax due of \$20,671.99.

3. On September 20, 1983 the Audit Division issued identical notices of determination and demands for payment of sales and use taxes due to the corporation and to petitioner Paul Wehr, as officer. The assessments covered the period January 1, 1981 through December 31, 1981 and claimed tax due of \$20,671.99, penalty due of \$5,122.69 and interest due of \$5,438.97 for a total due of \$31,233.65.

4. Prior to the period at issue, petitioner Paul Wehr worked for Dioclide Dominguez as a gas station attendant at a filling station operated by Mr. Dominguez in Hempstead, New York. After that station closed, Dioclide Dominguez and petitioner Paul Wehr decided to open the Merrick Road station.

5. Dioclide Dominguez and Paul Wehr formed the corporation, each receiving 50% of the capital stock. Mr. Dominguez was president and Paul Wehr was secretary. Paul Wehr and his father, Roman Wehr<sup>1</sup>, contributed \$8,000.00 in cash to the venture and Mr. Dominguez contributed a tow truck and tools also valued at \$8,000.00. Roman Wehr contributed an additional sum totalling approximately \$19,000.00 for purchases of gasoline. The corporation

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<sup>1</sup>A "partnership" agreement among Dioclide Dominguez, Paul Wehr and Roman Wehr indicates that Roman Wehr was to be an equal partner. It appears that Roman Wehr's role in the business, however, was as an investor. There is nothing in the record to indicate that Roman Wehr was a shareholder in, or officer or director of the corporation.

leased the station from Amtec.

6. When Dioclide Dominguez and Paul Wehr opened the station in January 1981, Mr. Dominguez was about 45 years of age and Paul Wehr was 20 years of age.

7. The corporation's checking account required two signatures: those of Dioclide Dominguez and Paul Wehr. Mr. Dominguez induced Paul Wehr to sign ten to twelve checks at a time, in blank. Mr. Dominguez would then draw the checks as they were needed.

8. The station had been closed for nine months to a year prior to the time that the corporation took it over in January 1981. For the first few weeks, very little was done except to clean and repair the premises. The hydraulic lifts in the service bays were at first inoperable and virtually no repairs were performed until April 1981. In fact, Amtec granted the corporation a rent concession because of the problem with the service bays.

9. The station was open from 7:00 A.M. to 8:00 P.M. daily. One of the principals would come in early in the day and then leave early; the other would come in later and leave at closing. The station employed no one except Mr. Dominguez and Paul Wehr.

10. One day in the latter part of 1981, Dioclide Dominguez left the business, taking his truck, his tools and his equipment and most of the business records.

11. According to Amtec records attached to the field audit report, no gasoline or diesel fuel was delivered to the station after October 1981. The lease for the station was terminated as of December 23, 1981.

12. On November 26, 1982 petitioner Paul Wehr and his father Roman Wehr won an arbitration award against Dioclide Dominguez in the amount of \$8,000.00 for damages connected with the operation of the station. The award was confirmed by the Supreme Court of the State of New York, Nassau County. However, as of the date of the hearing, Paul Wehr and Roman Wehr had not been successful in collecting any part of the award.

### CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous ( *Surface Line Operators Fraternal Organization Inc. v. Tully*, 85 AD2d 858).

C. That in this case the corporation's records were clearly incomplete and insufficient (Findings of Fact 2[c], [d] and [e]). Accordingly, it was proper for the Audit Division to perform an audit based on sales reported by the corporation's supplier. However, since the station had no employees except Diocledes Dominguez and Paul Wehr, both pumped gas in addition to their duties as mechanics and both men were alone at the station for at least part of each day, it was unrealistic to assume that the bays would generate \$1,500.00 per week each. Repair sales are to be reduced from \$3,000.00 per week to \$1,500.00 per week, on the assumption that each of the bays was used at 50% of capacity. Also, in view of the fact that the station's lifts were inoperable until April 1981, the number of weeks for repairs (after allowance for vacations and holidays) is to be reduced to 36 weeks.

D. That Tax Law § 1133(a) provides, in pertinent part, as follows:

"Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article".

E. That during the period at issue, Tax Law § 1131(1) provided as follows:

"'Persons required to collect tax' or 'person required to collect any tax imposed under this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

F. That petitioner Paul Wehr was not a person required to collect tax on behalf of D & W Auto Service Center, Inc. While he admittedly owned one-half of the capital stock in the corporation and served as secretary, he was only 20 years old at the time he entered into the venture and was, in effect, the unwitting victim of Diocledes Dominguez, who actually controlled the business.

G. That the petition of D & W Auto Service Center, Inc. and Paul Wehr, as officer, is granted to the extent that the portion of the tax attributable to receipts for repair sales is reduced as per Conclusion of Law "C" and further that Paul Wehr is determined not to be a person required to collect tax as per Conclusion of Law "F". The Notice of Determination and Demand issued against D & W Auto Service Center, Inc. on September 20, 1983 is to be modified in accordance herewith. The Notice of Determination and Demand issued to Paul Wehr, as officer of D & W Auto Service Center, Inc., on September 20, 1983 is cancelled in full.

Dated: Albany, New York  
July 8, 1988

/s/  
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ADMINISTRATIVE LAW JUDGE